received with favor. The operation of the law rather than the object of the legislature is the important consideration. The other test, which has been acted upon by the courts, and which may be regarded as well established, is this. Is the subject matter of the law of such a nature as to admit only of one uniform system throughout the country? If so, the power of Congress to enact laws is absolutely exclusive. But if the subject is one which does not require national uniformity, one upon which different regulations would be suitable, varying according to the diverse interests and conditions of particular places, the State may legislate. *Cooley* v. *Board of Wardens*, 12 How. 299, 319. As an application of this principle, State legislation on the subject of quarantine, inspection regulations, and the construction of bridges over navigable streams, is held constitutional, though such legislation directly affects interstate commerce.

Now, accepting this last test as the correct one, who is to decide whether the subject covered by a State statute needs national or local treatment? The determination of this question should rest with the Federal Legislature. For the answer turns on many considerations of practical expediency, which are pre-eminently matters for legislative investigation. Since Congress by the express terms of the Constitution is given the power to regulate commerce among the States, it seems that Congress, and not the courts, should have the supervisory action over such State legislation as has to do with interstate commerce. It may then be doubted whether the judiciary should interpose in any given case to pronounce a State regulation of commerce unconstitutional, unless it appears beyond a doubt that the subject of legislation is one requiring national uniformity, leaving to Congress its undoubted right to annul the effect of the law by its own subsequent enactments. 2 Thayer's Cases on Constitutional Law, 2190, 2191.

It is true that the court has not always taken this position, as is shown by the great case of *Leisy* v. *Hardin*, *supra*. But the more recent decisions of *Plumley* v. *Commonwealth of Massachusetts*, *supra*, and *Hennington* v. *State of Georgia*, seem to indicate that perhaps that case is in danger. The *personnel* of the United States Supreme Court has changed much in the six years since *Leisy* v. *Hardin* was decided. Four of the six judges then in the majority are no longer on the bench. Is it not possible that the court is gradually getting away from that decision, — that the judges who were then in the minority, and who would seem to have been right on principle, are now gaining the upper hand?

RECENT CASES.

CARRIERS — LIABILITY OF OWNERS OF STEAMBOATS AS INNKEEPERS. — The plaintiff, a passenger on the defendant's steamboat, had upon his person $160 in money for the expenses of the journey. On retiring he left this money in his clothing in the stateroom, and during the night it was stolen, without any negligence on his part. *Held*, that the defendant was liable for the loss, without any proof of negligence on its part. *Adams* v. *New Jersey Steamboat Co.*, 45 N. E. Rep. 369 (N. Y.).

The decision is rested on the ground that a steamboat is, in effect, a floating inn, and that therefore the common law rule making innkeepers insurers of the money and

personal effects of their guests should be applied. It is submitted, however, that the case cannot be supported on principle or authority. Innkeepers were originally held to a strict liability, because, among other reasons, the inn was sought chiefly for protection. This argument in favor of an extensive responsibility does not exist in the case of steamboats and sleeping cars, their chief service being, not protection, but transportation; and it is quite possible that, were the question raised for the first time at the present day, the rigor of the rule with regard to innkeepers would be somewhat relaxed. In *Clark* v. *Burns*, 118 Mass. 279, where the plaintiff was a passenger on the defendants' steamer, and where his watch, placed in his clothing, was stolen from the stateroom at night, without negligence on the part of the defendants, it was held that the defendants were not liable as innkeepers; nor as carriers, inasmuch as the watch was not intrusted to their custody and control. See *Am. Steamship Co.* v. *Bryan*, 83 Pa. St. 446. But see also *Pullman Co.* v. *Lowe*, 28 Neb. 239, where a sleeping car company was held liable as an innkeeper. On the question as to whether the defendant, in the principal case, should have been held liable as a carrier, see Angell on Carriers, §§ 103, 115; Redfield on Carriers, §§ 77–87; Kent's Com., *601, n.(*c*); Story on Bailments, § 595; Browne on Carriers, pp. 62–74.

CONSTITUTIONAL LAW — ENACTMENT OF STATUTES — IMPEACHMENT BY JOURNAL. — A State Constitution provided that no law to impose a tax should be passed, unless the yeas and nays were entered on the journals. The act in question was voted on by both branches of the legislature, attested by the presiding officers, duly enrolled, and printed among the State statutes. *Held*, that the omission from the journals of the yeas and nays invalidated the law. *Union Bank of Richmond* v. *Commissioners of Town of Oxford*, 25 S. E. Rep. 966 (N. C.).

How far, in general, courts will go into outside evidence, to prove invalid a statute which is properly enrolled and published, is not wholly settled. But they will clearly not look behind the journals of the two houses. So facts tending to show corrupt motives on the part of the legislature in passing a law will not be considered. A point of much difficulty is where the enrolled act and the journals do not agree as to the contents of a given bill. On the question which of the two records shall then control, the cases are conflicting. The English rule is to disregard the journals. And perhaps this can be said to be the tendency of recent decisions in America. This view has the argument of convenience in its favor. A full collection of authorities by States in *Field* v. *Clark*, 143 U. S. 649, 661, shows that upon this point the jurisdictions in this country are about evenly divided.

A somewhat different problem is presented when the Constitution expressly provides that certain formalities be observed, as, for example, that the yeas and nays appear on the journals. Under such a constitutional requirement the journals are usually examined, and if there is an absence of the yeas and nays from the record it defeats the statute. Cooley, Const. Lim., 6th ed., 168. There are, however, some cases which hold that even then the enrolled act cannot be impeached by the journals. *Lafferty* v. *Huffman*, 35 S. W. Rep. 123 (Ky.). The court's assumption that the authorities are all on its side is hardly warranted.

CONSTITUTIONAL LAW — INTERSTATE COMMERCE. — *Held*, that a State statute requiring all passenger trains passing through a country to stop at the county seat is unconstitutional as a regulation of interstate commerce. *Illinois Cent. R. Co.* v. *State of Illinois*, 16 Sup. Ct. Rep. 1096.

Held, that a State law prohibiting the running of freight trains on Sunday is not invalid, as interfering with interstate commerce, though it prevents trains from passing through the State on that day from and to adjacent States. Fuller, C. J., and White, J., dissenting. *Hennington* v *State of Georgia*, 16 Sup. Ct. Rep. 1086. See NOTES.

CONSTITUTIONAL LAW — SUBCONTRACTOR'S LIEN ACT. — *Held*, a statute giving to subcontractors and to those furnishing materials to the principal contractor a lien on the building contracted to be built, is unconstitutional, such statute being in conflict with Section 1 of the Bill of Rights, which declares that all men have certain inalienable rights, among which are those of enjoying liberty. *Palmer* v. *Tingle*, 45 N. E. Rep. 313 (Ohio).

The opinion in the principal case cannot be deemed conclusive. The court, on no very satisfactory authority, assumes the phrase "enjoying liberty" in the Bill of Rights to guarantee the freedom of contract subject only to such restraints as are necessary for the common welfare. The decision rests on this assumption, — an assumption which is soundly combated in an article by C. E. Shattuck, 4 HARVARD LAW REVIEW, 365. The decisions in different jurisdictions as to the constitutionality of statutes substantially similar to that involved in the principal case are in conflict.

CONSTITUTIONAL LAW — TAXATION FOR LOCAL IMPROVEMENTS — IRRIGATION DISTRICTS. — A statute authorized the formation of irrigation districts in California upon the application of fifty or a majority of the landowners in a district susceptible of one mode of irrigation from a common source. The cost was to be met by an *ad valorem* assessment on all the lands which could derive any benefit from the work. *Held*, the statute is not unconstitutional. Fuller, C. J., and Field, J., dissenting. *Irrigation Dist.* v. *Bradley*, 17 Sup. Ct. Rep. 56.

It is worthy of remark that the court nowhere in the decision speak of the police power. The ground taken is that in view of the condition of the country in the "arid belt," the use for which the water is to be procured is a public one, and the assessment therefore justified on the general principles of taxation. How far the purpose served is a public one is of course a matter of fact depending on the surrounding circumstances. And it is a delicate question whether the improvement is sufficiently public in its nature to justify the imposition of the tax upon one who does not care to avail himself of its benefits. The question seems to be no different from that involved in cases where a district is drained at the expense of the landowners, *Wurts* v. *Hoagland*, 114 U. S. 606, except that in the principal case the absence of any possible menace to the public health, and the fact that it is possible to perfect the work without giving any of its advantages to an owner who does not care to avail himself of them, serve to bring out the grounds of the decision more sharply.

An incidental objection urged by the appellee was, that, as the assessment was *ad valorem*, it might not be in proportion to the benefits conferred, but it was held that the apportionment of the tax was a matter of detail within the discretion of the legislature, which would not be disturbed unless manifestly unjust.

CONTRACTS — EXEMPTION FOR NEGLIGENCE UNDER FOREIGN LAW. — A bill of lading contained exemptions of damage from stowage and negligence, and provided that the contract should be governed by the law of the flag (English). The contract was not made, nor was any part of it intended to be performed, within British jurisdiction. *Held*, that such exemptions not being allowed by our law, the provisions of the bill of lading were void, notwithstanding such provisions would be valid by British law. *Brotany Worsted Mills* v. *Knott*, 76 Fed. Rep. 582.

The decision is eminently sound. As it is not permitted by the laws of their country to exempt for negligence, no contract made on such a basis can be valid. It may be objected that it was the expressed intention of the parties to be governed by the law of England. It is true that, where the place of making and the place of performance are different, many courts hold that the intention of the parties as to what law should govern, is of paramount importance. This, though a wide spread, is thought to be an incorrect doctrine. *Akers* v. *Demoud*, 103 Mass. 323; 10 HARVARD LAW REVIEW, 170. And in any event, no court would be likely to go so far as to say that where the making and performance of a contract are within the same jurisdiction, the parties may elect to be governed by the law of a different jurisdiction.

CONTRACTS — WILFUL BREACH — DAMAGES. — *Held*, that a contractor, though wilfully abandoning and refusing to complete a building contract, may recover on a *quantum meruit* a sum not exceeding the contract price, less the cost of completing the work and less any damage and added expense incurred by the defendant by reason of the breach of contract by plaintiff. *Sheldon* v. *Leahy*, 69 N. W. Rep. 76 (Mich.).

This decision, in *accord* with *Britton* v. *Turner*, 6 N. H. 481, is sound in principle, and notes a tendency to follow that leading case in other jurisdictions. Under the rule as laid down there can be no possibility of loss to the defendant, and there is no valid reason why he should be unjustly enriched. But the great weight of authority is *contra* to the principal case. See Keener on Quasi Contracts, 215, and cases cited, and on grounds of public policy these latter cases are supported, as it is easily seen that if a recovery is allowed on a *quantum meruit* there will be an increasing tendency to break existing contracts.

CORPORATIONS — INVALID APPOINTMENT — RECOVERY OF SALARY. — A decision that one of the members of a municipal board had not been properly elected invalidated the appointments of that board. *Held*, that an attorney whom they had appointed could not recover for services already performed. *Mayor of Jersey City* v. *Erwin*, 35 Atl. Rep. 948 (N. J.).

It is generally stated in the text-books that a *de facto* officer of a municipal corporation cannot recover for his services. A distinction is thus made between municipal and private corporations. In the cases cited to support this proposition, it appears that there were *de jure* officers also claiming the appointment; consequently those usurping the position were rightly not allowed to recover what belonged to others. Here this is not the case, and no grounds of public policy seem to demand an exceptional doctrine.

CORPORATIONS — LIABILITY OF STOCKHOLDERS — TRANSFER OF STOCK. — *Held*, that one who has given notice to a corporation to transfer his stock on their books will not be liable as a stockholder on an assessment. *Cox* v. *Elmendorf*, 37 S. W. Rep. 387 (Penn.).

In bringing his bill, the receiver enforces the rights of the corporation against its stockholders. Defendant is legally a stockholder, but only because of the negligence of the corporation, and therefore, unless there is something peculiar about the case, it would seem as if equity would require the corporation to make the transfer which would release the defendant. Mr. Taylor, in his work on corporations, considers that the case is exceptional. He says that the receiver represents the creditors as well as the corporation; that the stockholder in putting his name on the books alleges that he will be liable to pay up assessments; that on this statement the creditor has a right to rely. But, as a matter of fact, the stockholder does not make such a representation. He simply says that he or his transferee will be liable. Every creditor knows that the corporation which pays the debt will probably not be composed of the same persons as the corporation which borrowed, and so cannot complain because defendant is released and his assignee substituted.

CORPORATIONS — RAILROADS — EXECUTION. — *Held*, that the portion of the right of way of a railroad passing through a county may be sold on execution for the payment of taxes upon it. *Purefoy* v. *Lamar*, 20 So. Rep. 975 (Ala.).

Though the right of a railroad in its road-way is generally an easement only, it has been held none the less alienable. As an easement in gross, it is sometimes considered as granted to the public, whom any railroad company may represent. Pierce on Railroads, 528, 529; 2 Wood on Railroads, 901. But a more satisfactory view is that it is an easement appurtenant to the whole property of the railroad company, and so alienable with that. *Junction Ry.* v. *Ruggles*, 7 Ohio St. 1. If the latter position is correct, however, it is difficult to support the principal case; for only a portion of the easement and tracks were declared transferred, without any property to which they might be regarded as annexed. Nor is the decision supported by the cited authority. In *Tenn. Ry.* v. *E. Ala. Ry.*, 75 Ala. 516, it is decided that a railway company may bring ejectment for their easement; while *Hooper* v. *Ry.*, 78 Ala. 213, decides that railroads may be ejected from land. There is, moreover, a common objection that no railway corporation may be deprived of the property by which it is to serve the public. *Plymouth Ry.* v. *Colwell*, 39 Pa. St. 337. *State* v. *Rives*, 5 Ired. 297, *contra*.

CORPORATIONS — ULTRA VIRES LEASE — RECOVERY OF RENT. — Where a corporation made an *ultra vires* lease, *held* that the amount of the rent that accrued while the lessee was in actual possession may be recovered from a surety on a bond conditioned for performance of the covenants of the lease. *Bath Gaslight Co.* v. *Claffy*, 45 N. E. Rep. 390 (N. Y.). See NOTES.

CRIMINAL LAW — HOMICIDE — SELF-DEFENCE — DUTY TO RETREAT. — *Held*, a person who is unlawfully attacked by another may stand his ground, and use such force as at the time reasonably appears to him to be necessary to protect himself. *State* v. *Hatch*, 46 Pac. Rep. 708 (Kan.).

This is true up to a certain point. Doubtless a person who is unlawfully assaulted may stand his ground and meet force with force, so long as there is no question of extreme violence or taking life. But where there is a state of facts such that the person attacked has the alternative of retreating or of killing his assailant, there seems no doubt that he ought to retreat. He should take his assailant's life only when, in his opinion, as a reasonable man, that is the only means of saving his own. 9 HARVARD LAW REVIEW, 214; *State* v. *Donnelly*, 69 Iowa, 705. The Kansas court, on the contrary, expressly repudiates this view, and lays down the dangerous principle that one unlawfully attacked need never retreat, but may meet force with force to the last extreme.

EQUITY — INJUNCTION — PUBLIC NUISANCE. — The State authorities applied for an injunction against the keeper of a common gambling-house. *Held*, that, though a common gambling-house is a public nuisance, the court would not issue an injunction unless irreparable injury is threatened to property or civil rights, which is not shown here. *State* v. *Patterson*, 37 S. W. Rep. 478 (Tex.). See NOTES.

EQUITY — JUDGMENT CREDITOR'S BILL. — *Held*, that equity will not entertain jurisdiction of a bill by a judgment creditor, seeking to subject a widow's right of dower, before assignment to her, to the payment of the judgment debt. *Harper* v. *Clayton*, 35 Atl. Rep. 1083 (Md.).

Though there is not much authority on this point, the weight of opinion seems to be that equity will aid judgment creditors to reach the right of dower of the widow

before it has been assigned. 3 Pomeroy's Eq. Juris. § 1383. Her right before assignment of dower being a chose in action, and the better view being that, although a chose in action belonging to the debtor cannot be seized upon common law execution, yet it can be reached through the aid of equity (*Hadden* v. *Spader*, 20 Johns. 554), the decision in *Davison* v. *Whittlesey*, 1 MacArthur, 163, *contra* to the principal case, seems a more correct exposition of the law. As stated in the last mentioned case, it is unjust for the widow to defeat the rights of her creditors by neglecting to ask for a formal assignment; this forms another good ground for the interposition of equity.

EQUITY — SUBROGATION. — Petitioner, a tax collector, accepted a check in payment of taxes on the land. The check was never paid, the drawer having become insolvent. A statute required the payment of taxes in cash. Petitioner prayed that he might be subrogated to the lien of the State for the taxes thus paid. *Held*, petitioner's case did not entitle him to the relief asked. *Mercantile Trust Co.* v. *Hart*, 76 Fed. Rep. 673.

A third person who had advanced to the tax payer money with which to pay the taxes on the land could not ask subrogation. On the facts of the principal case the tax collector is substantially in the position of such third person; his act amounted to cashing the tax-payer's check on his — the collector's — individual account. The interesting question as to whether one can under any circumstances claim subrogation to the State's lien for taxes, though touched on, is not discussed.

EVIDENCE — DECEASED WITNESS — TESTIMONY GIVEN AT FORMER TRIAL. — A was accused of murder. On the preliminary trial B was a witness, and testified against him. A was present and had the opportunity of cross-examination. B afterwards died, and at a later trial the evidence was offered which B had given at the former hearing. *Held*, it was inadmissible. *Cline* v. *State*, 36 S. W. Rep. 1099; 37 S. W. Rep. 722 (Tex.).

The majority opinion does not seem sound. It is based on too strict a construction of that constitutional provision, which is found in almost every State, to the effect that in criminal prosecutions the prisoner shall be confronted with the witnesses against him. The court reads this language of the Constitution with absolute literalness, failing to appreciate the fact that it should be interpreted in the light of the history of the law. The reasoning advanced, resting as it does on the literal words of the Constitution, would apply equally well to dying declarations, although one would hardly think seriously of contending that these should be excluded. Formerly a few States did refuse to receive the reported testimony of a witness living at a former trial, and since deceased. But the cases are now practically unanimous against this view. Best on Ev. Am. ed., 472, 473; Jones on Ev. § 345. One of the latest adjudications on the subject is by the United States Supreme Court in *Mattox* v. *United States*, 156 U. S. 237, 240, a decision which is directly *contra* to the result reached in the principal case.

INSURANCE — INTERPRETATION OF AN AVOIDING CLAUSE — VALIDITY OF A PRIOR POLICY. — The defendant company issued a policy to the plaintiff, containing the provision that if a subsequent policy should be taken on the same premises the policy should be void. The plaintiff took another policy containing the provision that it should be void if there existed any other policy. *Held*, that the taking of the second did not render the prior one void, but that the plaintiff could recover. *Sweeting* v. *Mutual Fire Ins. Co.*, 34 Atl. Rep. 826 (Md.).

As this was the first time the question had arisen in Maryland, the court were not bound by any decision in that State, but were at liberty to follow the opinion that, as the second was unenforceable as soon as issued, the condition in the first was not violated. *Thomas* v. *Ins. Co*, 119 Mass. 121; *Ins. Co.* v. *Holt*, 35 Ohio St. 189; *Stacey* v. *Ins. Co.*, 2 Watts & S. 506; *Lindley* v. *Ins. Co.*, 65 Me. 368; *Gee* v. *Ins. Co.*, 55 N. H. 65; *Ins. Co.* v. *Nichol*, 35 N. J. Eq. 291; *Ins. Co.* v. *Slaughter*, 20 Ind. 520. The opposite result was reached in *Carpenter* v. *Ins. Co.*, 16 Pet. 495; *Allen* v. *Ins. Co.*, 30 La. Ann. 1386; *Somerfield* v. *Ins. Co.*, 8 Lea, 547; *Biglers* v. *Ins. Co.*, 22 N. Y. 402; *Tunke* v. *Ins Co.*, 29 Minn. 347. These cases proceed on the theory that the second policy is not void at once, but that the provision in question only gives the insurer a defence in an action on the policy, and until that defence is taken the policy is not void, as its nullity does not appear upon its face. In order to answer this argument recourse must be taken to the intention of the parties and the provision viewed in that light. The obvious intention was to prevent the possibility of the insured over-insuring. This purpose is attained when he had only one policy on which he can recover. As the words of the provision will bear such an interpretation, it may well be said that the view taken in the principal case represents the better opinion, for in it justice and the real object of the provision prevail over a mere technicality. There is another or intermediate view taken in *Hubbard* v. *Ins. Co.*, 33 Iowa, 355, that the validity of the prior policy turns on

the question whether the subsequent one has in fact been avoided. This opinion is clearly insupportable, for it makes the validity of an agreement between two parties turn on the arbitrary acts of a third party, which were not provided for in the agreement. The opinion in the principal case is well reasoned.

INSURANCE — SUBROGATION. — A lessor agreed with a sub-tenant to lay out any money received from his (the lessor's) insurance on repairing, and the sub-tenant covenanted with his lessor to leave in repair. The sub-tenant then took out insurance with the plaintiff company in his own name, and on the destruction of the property recovered the amount of insurance from the plaintiff. *Held*, that the plaintiff might recover the amount which it had paid, the defendant having, for his own reason, released his lessor from the covenant to make good such damage, and thereby having deprived the plaintiff of its right of subrogation. *West of England Ins. Co.* v. *Isaacs*, [1896] 2 Q. B. 377.

A policy of fire insurance is a contract of indemnity, and the insurer on making good the loss is entitled to stand in the shoes of the insured. *Darrell* v. *Tibbetts*, 5 Q. B. D. 560. Moreover the insurer is entitled to any rights which have accrued to the assured, whether fulfilled or unfulfilled. *Castellain* v. *Preston*, 11 Q. B. D. 380. The release of the lessor, since there was no question of fraud on his part, was a valid one; but as the defendant had no right to release him, *Monmouth Ins. Co.* v. *Hutchinson*, 21 N. J. Eq. 107, it seems only reasonable that the assured should be liable to the insurer for the benefit, to which they had a right to be subrogated, and which was lost to the insurer by the act of the assured.

PERSONS — SALE OF OPIUM TO WIFE. — *Held*, that a husband may recover damages from a druggist who, against the husband's orders, has sold laudanum to his wife, in consequence of which she has become a confirmed subject of the opium habit, resulting in the loss of her services and companionship. 25 S. E. Rep. 972 (N. C.).

In North Carolina a husband is entitled to his wife's earnings, so that the plaintiff has suffered a more tangible injury than mere loss of companionship. The court takes the ground that the defendant is liable because he has wilfully assisted the wife in doing an act which has deprived her husband of her services and companionship. To be sure it was in the course of business and with the purpose of gain, but that hardly justifies the voluntary infringement of the husband's rights. *Hoard* v. *Peck*, 56 Barb. 202, is in *accord* with the principal case. It would be interesting to see whether the same view would be taken to-day in jurisdictions where by statute a married woman is practically independent. In such States it seems that the same rule should apply to actions by the wife for loss of her husband's companionship under like circumstances.

PROPERTY — ADVERSE POSSESSION — INFANCY OF TENANT IN COMMON. — In an action for the recovery of land, by tenants in common, *held* that the minority of one tenant in common will protect the entire property held in common from the operation of the Statute of Limitations in favor of an adverse claimant in possession. *Garret* v. *Weinberg*, 26 S. E. Rep. 3 (S. C.).

There seems to be no reason why the minority of one tenant in common should prevent the Statute from running against the adult tenants. The defendant has had adverse possession for the statutory period. But the infant tenants, having been under a disability during that time, are protected. The adults, however, have labored under no disability, and against their claims the defendant should be allowed to plead the Statute of Limitations. The contrary doctrine, as held in South Carolina is the result of early decisions in that State, adopted with reluctance in later cases. *Hill* v. *Saunders*, 4 Rich. 521.

PROPERTY — CONSTRUCTION OF WILL — ELECTION. — In an action to which plaintiff was not a party, it was decided that on the death of one of testator's married daughters without children her share should go to her sisters. Plaintiff through his wife received a share under such division. On her death, he now claims that the will should be construed to give her property to her heirs generally, including him. *Held*, that, having acquiesced in the above distribution of a similar interest, he could not now contend for a contrary interpretation of the will. *In re Lart*, [1896] 2 Ch. 788.

The point decided is a novel one. The only cases cited by counsel, holding that where one stands by while a will in which he is interested is being interpreted he is bound by the result, were distinguished by the court on the ground that the exact claim now presented had not been decided in the previous judgment. The gift to the first daughter, though similar, was not identical with the one in question. The result reached, however, is clearly correct, resting on the broad and ancient doctrine that a man taking a benefit under an instrument may not maintain inconsistent positions. See 4 Com. Dig. 76. It has frequently been held that one who accepts a benefit under

a will agrees to the whole of it. It would seem by analogy, that one knowing all the facts, who accepts a gift under one construction, agrees to have that construction applied to the whole will.

PROPERTY — COVENANT OF WARRANTY — MEASURE OF DAMAGES. — *Held*, that an evicted covenantee may recover of a remote warrantor of the title the sum received by such warrantor from his immediate grantee as the price of the land, though such covenantee himself paid to his immediate grantor a less sum. *Hollingsworth* v. *Mexia* 37 S. W. Rep. 454 (Tex.).

In an action on a warranty of title to land by the immediate covenantee, nearly all the States outside New England fix the damages for total eviction at the amount of the purchase money, on the ground that, as this is simply a substitute for the ancient real warranty, the thing promised is to restore the value of the land at the time of the covenant. *Pitcher* v. *Livingston*, 4 Johns. 1; *Sutton* v. *Page*, 4 Tex. 142. If this ground is correct, it is difficult to see how the liability of the covenantor can be increased or diminished by any subsequent dealings with the land. Several courts, however, have held that the liability of the covenantor is limited to the price paid by the plaintiff, if that is less than the covenantor received. *Crisfield* v. *Storr*, 36 Ind. 129; *Mette* v. *Dow*, 9 Lea. 93; *Williams* v. *Beeman*, 2 Dev. 483. The rule of the principal case is followed in *Brooks* v. *Black*, 68 Miss. 161, *Lawrence* v. *Robertson* 10 S. C. 8, and *Mischke* v. *Baughn*, 52 Iowa, 528.

PROPERTY — JUDGMENTS — COLLATERAL ATTACK. — *Held*, a sale of land by an administrator, confirmed by the Orphan's Court, made on its order on the administrator's petition, alleging death of the intestate seised of the land, the existence of the debt, the insufficiency of personal estate, and the necessity of selling the land to pay the debt may be attacked collaterally by the heirs, for want of jurisdiction of the Orphan's Court, because the debt was barred by the Statute of Limitations, and the land was by provision of statute relieved from the lien of the decedent's debt, though the want of jurisdiction does not appear upon the record. *Rees* v. *Wildman*, 35 Atl. Rep. 1047 (Pa.).

It is a well established rule of law, that, if a court has no jurisdiction, its judgment may be collaterally attacked. The reason for this is obvious. But the principal case is one in point, and resembles closely the cases involving the administrator's sale of a living person's estate, where it has been held that the sale is absolutely void. *Jochumsen* v. *Suffolk Savings Bank*, 3 Allen, 87; *Scott* v. *McNeal*, 14 Sup. Ct. Rep. 1108.

PROPERTY — LIABILITY FOR RENT — DESTRUCTION OF PREMISES — EVICTION. — The plaintiff leased to defendant a "landing" on a river. By an extraordinary flood the bank was swept away, so that no practicable landing was left. Works were also built in the river by the lessor's authority, which prevented access to the shore. *Held*, that defendant's liability for rent was extinguished; first, because the property leased was wholly destroyed; and secondly, because he might be considered as evicted by the lessor's acts. *Waite* v. *O'Neil*, 76 Fed. Rep. 408. See NOTES.

PROPERTY — LICENSE TO CUT TIMBER — REPLEVIN. — The owner of some timber land gave a license to enter on the land and cut the timber for the licensee's own use; The plaintiff purchased this license for valuable consideration. The owner then sold the land to the defendant, reserving to himself and his assigns the timber and the right to enter and cut it. The defendant cut and carried off a part of the timber and on demand by the plaintiff refused to give it up. *Held*, in an action of replevin, that the plaintiff could recover. Carroday, C. J. dissenting. *Keystone Lumber Co.* v. *Kolman*, 69 N. W. Rep. 165 (Wis.).

The case presents a new and interesting question, and the court consequently discuss it from an *a priori* standpoint. The opinion of the majority is at least ingenious, based on the ground that the defendant is the agent of the plaintiff, and that therefore the act of severing is done by the plaintiff's agent so that he thereby acquires title. The opinion of the dissenting judge shows closer legal reasoning. His contention is that the defendant's act was a tort against the owner of the timber, since the title remained in him until the severance by the licensee, and that the plaintiff had no right to waive this tort as it was not against him, and adopt the defendant's wrongful act. That the defendant would be liable also to the licensor, the owner, seems clear, because the tort was against him in a destruction of his property. Whether the plaintiff might have an action on the case against the licensor or against the defendant for making his license less valuable is another matter. It is submitted that the opinion of the dissenting judge represents the better view.

PROPERTY — RENT CHARGE. — *Held*, that an action of debt will not lie against a tenant for years for the non-payment of a rent charge issuing out of the land of which he is in possession. *In re Herbage Rents*, [1896] 2 Ch. 811.

Although this case is not likely to come up in this country, where rent charges are almost unknown, it is of great importance in England, and it is curious that the exact point has never before been adjudicated upon. The ancient action at law for the non-payment of a rent charge was by assize of novel disseisin (Lumley on Annuities, 388), and when real actions were abolished it was held that debt would lie for the rent. *Thomas* v. *Sylvester*, L. R. 8 Q. B. 368. But the parties liable remained as before, the terre-tenants, or those only who had an estate of freehold in the premises. The grantee of the rent, however, could distrain the goods of the tenant for years, or even of a stranger, on the land. Gilbert on Distress, 35.

PROPERTY — WILLS — CONDITIONS IN RESTRAINT OF MARRIAGE. — *Held*, that the rule that conditions in restraint of marriage are void does not apply to second marriages. *Herd* v. *Catron*, 37 S. W. Rep. 551 (Tenn.). See NOTES.

PROPERTY — WILLS — EXECUTORY DEVISE AFTER DEATH "WITHOUT ISSUE." — A testator devised property to his son and his heirs, but provided that in case the son should die "without issue of his body, then the same to go to the heirs of N." In other parts of the will, the testator had provided for various children and grandchildren. *Held*, that the other provisions of the will and the use of the word "then" show that the testator meant by the words "without issue of his body," a definite failure of issue during his son's life. Such being the case, the devise to the heirs of N. is valid as an executory devise. *Strain* v. *Sweeney et al.*, 45 N. E. Rep. 201 (Ill.).

The above case illustrates the tendency of the American courts not to be bound by fixed rules of construction, and to follow a testator's supposed intention, even though the evidence of such intention is slight and of a conjectural character. See Jarman on Wills, 6th Am. ed., *1320, n. 1.

PROPERTY — WILLS — "SURVIVOR" CONSTRUED AS "OTHER." — A testator devised property to his wife for life, and on her death to his eight children "to them and their heirs and assigns forever, and in case of the death of any one of them without issue living at the time of his or her death, I do give and devise his or her share to the survivor or survivors." *Held*, the word "survivor" must be taken to have been used in its natural and ordinary sense, and not in the sense of the word "other." *Anderson* v. *Brown*, 35 Atl. Rep. 937 (Md.).

There are few American authorities on this point of construction, and those few treat the matter very summarily. The question, however, has arisen often in England, and the opinion of the court in the present case is based on the result of the English decisions. In *Twist* v. *Herbert*, 28 L. T. (N. S.) 489, Lord Selborne says, "The words 'survivor' or 'survivors' are to be taken in their natural and primary sense, except when there is some reason which justly leads to another conclusion." See also *Maden* v. *Taylor*, 45 L. J. Ch. 569. A common case where "survivor" would generally be construed as "other" occurs when property is given to A and B in fee as tenants in common, with an executory devise to the survivor on the death of either without issue, and a further executory devise over on the death of both without issue. In such a case, if A should die first leaving issue, and then B should die without issue, the property would go to A's issue, although they are not technically included in the word "survivor"; otherwise there would be an intestacy, as the second executory devise was contingent on the death of both A and B without issue. See *Smith* v. *Osborne*, 6 H. L. 374.

PUBLIC OFFICER — LIABILITY FOR PUBLIC MONEYS. — The defendant, a town supervisor, deposited with a firm of bankers, to his credit as supervisor, public moneys in his hands. The banking firm failed, and the money was lost. The defendant acted in good faith and without negligence. Action was brought by the county treasurer on the defendant's official bond. *Held*, on grounds of public policy, that the defendant, being under the duty to account as a debtor for the public funds in his custody, was liable. *Tillinghast* v. *Merrill*, 45 N. E. Rep. 375 (N. Y.), Gray, J. dissenting.

Strangely enough this question is now passed upon for the first time by the New York Court of Appeals. The decision seems to reach a just result, and to be in accord with cases in other jurisdictions, which hold that a public officer, required to account for public moneys coming into his hands, is liable, even though the money be lost by theft, bank failure, or the like, without his fau't, unless relieved from this responsibility by statute. See a recent case, *Fairchild* v. *Hedges*, 44 Pac. Rep. 125; *U. S.* v. *Prescott*, 3 How. 578; *Inhabitants of Hancock* v. *Hazzard*, 12 Cush. 112; *State* v. *Harper*, 6 Oh. St. 608; 1 Dillon on Munic Corp. § 237, n. 4; decisions cited in the principal case. But see also the dissenting opinion of Hoyt, C. J., in *Fairchild* v. *Hedges*, *supra*.

The court, in the principal case, by stating the defendant's liability as that of a debtor, probably did not mean to imply that he was not a trustee. That a public officer, much like a *del credere* factor, is a trustee, although held to the strict liability

of a common law debtor, is indicated by the fact that he may be indicted as an embezzler. Furthermore, it would seem clear that, if the officer became bankrupt, and the public funds were traceable, the organization to which he was responsible would have a specific claim on the funds and would not come in as a general creditor. The court, in the principal case, leaves open the question as to the legal result were the officer prevented from responding by the act of God or the public enemy, intimating, however, that in this case he would be exonerated. There is thus suggested a very strong analogy between a public officer and a common carrier.

SURETYSHIP — RIGHT TO RESERVE FUND. — A building agreement between the United States and a contractor provided for the retention of ten per cent of the contract price until the completion of the work. After beginning the work, the contractor agreed to deliver this reserve to the plaintiff bank, because of advances then made by it for the purpose of going on with the work. The contractor defaulted, and his surety completed the contract. *Held*, that the lien of the bank was inferior to the rights of the surety in the reserve. *Bank* v. *U. S.*, 17 Sup. Ct. Rep. 142.

The case presents an interesting application of the doctrine that the reserve is as much for the indemnity of the surety as of the party to whom the guaranty is given; *Bragg* v. *Shain*, 49 Cal. 131, and this equity of the surety arose at the time of his entering into the guaranty. The assignee of the contractor could acquire only such rights as the contractor had, and these were subject to the rights of the United States and the surety in the reserve. To hold the assignee entitled to the fund would be to deprive the surety of the indemnity of this reserve, and so alter the terms of his guaranty, thereby releasing him. *Calvert* v. *Dock Co.*, 2 Keen, 638.

TORTS — CONTRIBUTORY NEGLIGENCE IN MITIGATION OF DAMAGES. — *Held*, that where the defendant's negligence was the direct or proximate cause of the plaintiff's injury, contributory negligence on the part of the plaintiff will not prevent a recovery, but will be considered in mitigation of damages. *Southern Ry. Co.* v. *Pugh*, 37 S. W. Rep. 555 (Tenn.).

This case apparently represents the established rule of the Tennessee courts. See *Nashville Ry. Co.* v. *Smith*, 6 Heisk. 174. The doctrine seems to be essentially the same as that of "comparative negligence" and of similar rules adopted in Georgia and other American jurisdictions. See Beach on Contributory Negligence, 2d ed., §§ 72–99; Cooley on Torts, 2d ed., 813–816; Rev. Stats. of Florida (1892), 764, 1008. The Illinois courts have, however, in recent divisions, discarded their anomalous doctrine of comparative negligence. 8 HARVARD LAW REVIEW, 279, 356; 2 Jaggard on Torts, 979. It seems unfortunate that the courts in Tennessee do not also see their way clear to the adoption of a better rule, such as that of the prevailing common law rule represented by *Neal* v. *Gillett*, 23 Conn. 437. Unquestionably there is something to be said in favor of the rule in the principal case (Beach on Contributory Negligence, § 95), but it would seem that practical considerations, such as the impossibility oftentimes of equitably apportioning the damages in common law courts, should lead to its abandonment.

TORTS — MASTER AND SERVANT — RELIEF ASSCCIATION. — In an action by a servant against a railway company to recover damages for an injury through negligence, *held* that a plea that the servant accepted benefits as a member of a relief association, organized by the company, under the agreement that he thereby relinquished his right of action, does not constitute a good defence, since it does not sufficiently appear that his contract was not voidable for want of consideration. *C., B. & Q. Railway Co.* v. *Miller*, 76 Fed. Rep. 439.

The court go on the assumption that the stipulation in question is not opposed to sound public policy; and this would seem to be correct, inasmuch as the employee retains, until after he sustains the injury, the right to elect whether he will sue the company for negligence or accept benefits from the association. *Leas* v. *Penn Co.*, 37 Fed. Rep. 423; *Johnson* v. *Phil. & Read. R. R.*, 163 Pa. 127. But in cases of this character, where the contract invoked as a defence lies close to the line of public policy, it would seem doubly necessary that a sufficient consideration to support such a contract should appear with great clearness. *Railroad Co.* v. *McGraw*, 45 Pac. Rep. 383.

TORTS — PROXIMATE CAUSE — INJURIES FROM FRIGHT. — Defendant, by negligent driving, frightened plaintiff so that she afterward suffered a miscarriage and a long illness. *Held*, that no recovery may be had for injuries resulting from fright, caused by negligence of another, where no immediate personal injury is received, and that the negligence was not the proximate cause of the miscarriage. *Mitchell* v. *Rochester Ry. Co.*, 45 N. E. Rep. 354 (N. Y.).

This reverses in a short opinion a long and carefully reasoned decision in the Circuit Court, 25 N. Y. Supp. 744, affirmed by the Supreme Court, 28 N. Y. Supp. 1136.

The Court of Appeals is influenced largely by fear of opening the way for speculative claims, and admits no distinction in this respect between cases where the suffering is purely mental and those where the actual physical damage follows. The reasoning of the lower court, 25 N. Y. Supp. 744, is much more satisfactory, though of course the authority of *Victorian Ry. Commissioners* v. *Coultas*, 13 App. Cas. 222 (Privy Council), is very strong in support of the final decision. The case is discussed at length in a note, 7 HARVARD LAW REVIEW, 304. See also 10 HARVARD LAW REVIEW, 239.

REVIEWS.

GENERAL DIGEST. 1896. Vol. I., New Series. (Sept. 1, 1895, to July 1, 1896.) Rochester: The Lawyers' Co-operative Publishing Co. 1896. pp. viii, 1709.

GENERAL DIGEST. Quarterly Advance Sheets. (Supplement to Vol. I., New Series.) (No. 1, to October, 1896.) Rochester: The Lawyers' Co-operative Publishing Co. 1896. pp. 504.

A new scheme has been adopted for the publication of the General Digest. It is proposed to make the permanent volume semi-annual, and to confine it to cases that have already appeared in the official reports and those never to be officially reported. Digests of cases before they are incorporated in the official reports will be published in Quarterly Advance Sheets. These are convenient paper-bound volumes containing from four thousand to eight thousand cases each, and excellent as to classification. The permanent volume for 1896 is well arranged and the cases are succinctly digested. Judged by these its first specimens, the new plan would seem to be an improvement on older methods. R. L. R.

FEDERAL JURISDICTION AND PROCEDURE. By William A. Maury, LL. D., Professor in the Law School of Columbian University. Washington: W. H. Lowdermilk & Co. 1896. pp. 54.

While designed for the use of the student, this little compilation will unquestionably prove helpful to the profession. Its chief value lies in placing before the reader, in a convenient way, the recent Acts of Congress providing, among other things, for the establishment of the United States Circuit Courts of Appeals, and for the determination of their jurisdiction. To these the compiler has wisely added the several provisions of the Constitution bearing on the Judicial Power, certain provisions of the Revised Statutes relating to that power and regulating the appellate power of the Supreme Court, Rules of the Supreme Court, and an excellent selection of forms. The limitations of this work, however, incident to its size and general scope, are apparent; and for a complete presentation of the subject the student and the lawyer alike will be forced to turn to larger works, and to the Revised Statutes and Statutes at Large of the United States. While the absence of an index is not so much to be regretted, it would seem that, considering the nature of the volume, certain of the compiler's notes, and especially those containing citations to decided cases, might better have been placed at the foot of the page, instead of being introduced in the text between the sections of statutes.

H. D. H.